

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESLIE LONG,

Petitioner,

v.

CASE NO. 2:09-CV-227
JUDGE SMITH
MAGISTRATE JUDGE KING

BENNIE KELLY, WARDEN,

Respondent.

OPINION AND ORDER

On September 30, 2010, the Magistrate Judge issued a *Report and Recommendation* recommending that the instant petition for a writ of habeas corpus be dismissed. *Report and Recommendation*, Doc. No. 12. Petitioner has filed objections to the Magistrate Judge's *Report and Recommendation*, a request for a certificate of appealability and an application for leave to proceed *in forma pauperis* on appeal. *See* Doc. No. 13. For the reasons that follow, petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

Petitioner's request for a certificate of appealability and request to proceed *in forma pauperis* on appeal are **GRANTED**.

OBJECTIONS TO REPORT AND RECOMMENDATION

As her sole ground for habeas corpus relief, petitioner asserts that she was sentenced in violation of due process and the Ex Post Facto Clause when the trial court imposed non-minimum terms of incarceration subsequent to the Ohio Supreme Court's decision in *State v. Foster*, 129 Ohio St.3d 1 (2006)(excising provisions of Ohio's sentencing statutes determined to be unconstitutional

under *Blakely v. Washington*, 542 U.S. 296 (2004)). The Magistrate Judge recommended dismissal of this claim on the merits. In her objections to the Magistrate Judge's recommendation, petitioner raises all the same arguments she previously presented.

Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review. For the reasons detailed in the Magistrate Judge's *Report and Recommendation*, this Court is not persuaded by petitioner's arguments. Therefore, petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED and AFFIRMED**.

The Clerk shall enter **FINAL JUDGMENT** dismissing this action.

Petitioner requests a certificate of appealability. When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard is a codification of *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Slack v. McDaniel*, 529 U.S. 473, 484. To make a substantial showing of the denial of a constitutional right, a petitioner must show

that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. , at 893, and n. 4....

Id. The Court is persuaded that reasonable jurists could debate whether the claim asserted in this action should have been resolved differently. Therefore, petitioner's request for a certificate of appealability, Doc. No. 23, is **GRANTED**. The following issue is **CERTIFIED** for appeal:

Was petitioner denied due process and sentenced in violation of the
Ex Post Facto Clause?

Finally, petitioner has asked for leave to proceed on appeal *in forma pauperis*. However, petitioner has not provided the required financial affidavit. Petitioner's request in this regard is

therefore **DENIED** without prejudice to renewal upon submission of the required financial affidavit.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT